FOR ARGUMENT

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation,
COUNTRY CLUB ESTATES, a partnership, and
BOULDIN DEVELOPMENT CORPORATION,
a corporation,
Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY,
COUNTY OF EL DORADO,
STATE OF CALIFORNIA,
et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS JAMES HENRY AND WILLIAM BRINER

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OPINIONS BELOW

The opinions of the lower courts are separately referenced in the brief for petitioners.

JURISDICTION

The jurisdictional statement seet forth in the brief for petitioners is accurate.

QUESTIONS PRESENTED

1. Are members of the legislative body of the Tahoe Regional Planning Agency entitled to absolute immunity for enactment of land use regulations as required by the Tahoe Regional Planning Compact?

2. Have petitioners shown the violation of a clearly established constitutional right?

3. Are Tahoe Regional Planning Agency governing board members personally liable for the value of property taken for public purposes without compensation?

STATUTES INVOLVED

The statutes involved are these:

1. Tahoe Regional Planning Compact, California Government Code Sections 66800-66801; Nevada Revised Statutes, Sections 277.190-277.230; Public Law No. 91-148; 83 Stats. 360. The text of the Compact is reproduced as Appendix E to the petition for certiorari.

2. 28 U.S.C. Section 1331 (a):

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity."

3. The United States Constitution, Amendment V:

> ". . . nor shall private property be taken for public use, without just compensation."

4. United States Constitution, Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

In 1969 "in order to encourage the wide use and conservation of the waters of Lake Tahoe and of the resources of the area around said Lake", Congress approved a compact between the States of California and Nevada creating the Tahoe Regional Planning Agency (Tahoe Regional Planning Compact, Act of Dec. 18, 1969, P.L. 91-148, 83 Stat. 360; Cal. Gov't Code, Secs. 66800-66801; Nev. Rev. Stat., Secs. 277.190-277.230 (hereinafter called Compact)).

The respective legislatures found, inter alia, that ". . . . the waters of Lake Tahoe and other resources of the Lake Tahoe region are threatened with deterioration or degeneration, which may endanger the natural beauty and economic productivity of the region", and that ". . . . the region is experiencing problems of resource use and deficiency of environmental control." (Compact, Art. I)

The Compact directed the TRPA legislative body to adopt a Regional Plan including land use, conservation, and preservation of scenic and natural resources, recreation, transportation, and public services (Compact, Art. V(b)) and to adopt ordinances and regulations to implement said plan. (Compact, Art VI)

In February, 1972, TRPA enacted its Land Use Ordinance implementing its previously enacted General Plan (R. 112). A portion of petitioners' property was designated "General Forest" and the remainder was designated "Conservation Reserve" (R. 112, 113, 117). While the

"General Forest" designation contemplates primarily recreational and timber harvesting activities (R. 77), the "Conservation Reserve" is not so limited. The purposes of said district are set forth in the Land Use Ordinance as follows:

> *"7.110 Conservation Reserve District*
>
> 7.111 Specific Purposes:
>
> (1) To identify those lands susceptible to future development pursuant to the preparation of specific plans indicating the impact on the region of the proposed land use, population density, transportation, flood control, environmental protection, community design, recreation, schools, and other necessary facilities." (R. 87)

The references in Section 7.111 to "population density", "community design", "transportation", and "schools", quite clearly show that development will be permitted provided a specific plan is submitted setting forth the environmental impact of the proposal.[1]

Petitioners applied to TRPA for amendment of the General Plan to delete both the "General Forest" designation and the "Conservation Reserve" designation, so as to allow development of their property for multiple residential, country club and commercial uses (R. 9). The TRPA staff expressed concern regarding the failure of the proposed development to comply with the constraints recommended in the environmental study submitted by the developer (R. 379). Although the TRPA refused to permit such unrestricted development (R. 380), the governing body, on its own motion, placed the entire property in "Conservation Reserve" so as to permit development consistent with the environmental constraints of the region. The concluding comment by the chairman of the governing board was

> "The purpose here is not to deny the development of the property, but to put it into a condition whereby a more orderly form of application can be made and we can come to grips with the real issues". (R. 381)

Petitioners did not see fit to prepare a specific plan for development pursuant to the "Conservation Reserve" requirement, but instead filed their "COMPLAINT FOR JUST COMPENSATION AND DAMAGES FOR TAKING OF PRIVATE PROPERTY FOR PUBLIC USE; INJUNCTION AND DECLARATORY RELIEF (R. 1).

The courts below having held that TRPA is immune from suit in the federal courts, petitioners now seek to recover damages against the individual governing board members on the ground that petitioners' property has been taken for public use without just compensation.

SUMMARY OF ARGUMENT

Members of the TRPA governing body are entitled to absolute immunity from liability for enactment of land use ordinances by TRPA. Said immunity is founded upon the settled doctrine of legislative immunity. This doctrine is particularly applicable to regional legislative bodies such

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[1]The "Conservation Reserve" requirements are strikingly similar to the requirements of the National Environmental Policy Act for any activity involving a federal lease, permit, certificate, or entitlement for use, as well as the requirements of the California Environmental Quality Act for any developments requiring a governmental permit. Cf. 42 U.S.C., Secs. 4321, et seq.; Cal. Pub. Res. Code, Secs. 2100, et seq.; *Friends of Mammoth, et al. v. Board of Supervisors of Mono Co.*, 8 Cal.3d 247, 502 P.2d 1049 (1972).

as the TRPA governing body. Further, public policy requires absolute immunity to insure that the governing body has the freedom to enact regulations necessary for the protection of Lake Tahoe, without fear of personal liability to land speculators whose development plans may be frustrated.

Even if respondents were not entitled to absolute immunity, they are immune in this case by reason of the fact that petitioners have not shown the violation of a clearly established constitutional right.

In any event, the general jurisdiction statute (28 U.S.C., Section 1331) should not be extended to require that individual legislators acting under color of federal law provide just compensation for private property taken for public purposes.

RESPONDENTS HENRY AND BRINER ARE ABSOLUTELY IMMUNE FROM LIABILITY.

(A) Legislators Are Entitled to Absolute Immunity From Liability for Enactment of Legislation.

The only allegation against respondents Henry and Briner is that they were members of the governing board of TRPA which enacted the challenged Land Use Ordinance (R. 4).

This Court has consistently held that legislators are absolutely immune from liability for legislative acts. Federal legislators are entitled to common law immunity, as well as the immunity afforded Congress under the Speech and Debate Clause of the Constitution (*Kilbourn v. Thompson,* 103 U.S. 168 (1881)). The immunity of lower

level legislators, such as state legislators, is founded on the common law (*Tenney v. Brandhove,* 341 U.S. 367 1951)).

As stated in *McQuillin on Municipal Corporations* (1968) Vol. 4, p. 176:

> "That legislative officers are not personally liable for their legislative acts is so elementary, so fundamentally sound, and has been so universally accepted, that but few cases can be found where the doctrine has been questioned and judicially declared."

Although the immunity of local legislators for administrative actions, not directly related to legislation has been held to be less than absolute (See *Jones v. Diamond,* 519 F.2d 590 (5th Cir. 1975); *Cobb v. City of Maulden,* 202 F.2d 701 (1st Cir. 1953)), the rule is well recognized that even such local bodies are entitled to absolute immunity for enactment of legislation. (See *Martelli v. Pollock,* 162 Cal.App.2d 655, 328 P.2d 795 (1958); *Shellbourne Inc. v. Newcastle County,* 293 F.Supp. 237 (1968)).

The court in *Shellbourne,* held, at page 241:

> "Defendant members of the County Council are legislators being invested by the Delaware General Assembly with all the legislative powers of the county except as otherwise provided by state law. 9 Del. C. Sec. 1146. Zoning is a legislative function."

The court continued at page 242:

> "In determining the liability of lower legislative bodies a court is governed by principles of the common law. Under those principles the members of the County Council are entitled to claim an absolute immunity

from personal liability for acts within the scope of their legislative discretion."

As pointed out by this Court in *Kilbourn v. Thompson,* supra, legislative actions cannot be the foundation of any accusation or prosecution, action, or complaint in any court or place whatsoever.

The rule that legislative bodies are immune from suit for legislative acts was again enunciated by this Court in *New Orleans Water Works Company v. New Orleans,* 164 U.S. 471 (1896) wherein this Court held at page 482:

". . . a court of equity ought not, by any form of proceeding, to interfere with the course of proceedings in the city council of New Orleans, and enjoin that branch of its municipal government from hereafter passing ordinances similar to those heretofore enacted, and which are alleged to be obnoxious to the plaintiff's rights. The mischievous consequences that may result from the attempt of courts of equity to control the proceedings of municipal bodies when engaged in the consideration of matters entirely legislative in character, are too apparent to permit such judicial action as this suit contemplates. We repeat that when the city council shall pass an ordinance that infringes the rights of plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the state, it will be time enough for equity to interfere, and by injunction prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them."

Cf. *Gas and E. Securities Co. v. Manhattan and Q. Traction Corp.,* 266 Fed. 625 (1920); *Begg v. New York,* 262 U.S. 196 (1923); *Clough v. Curtis,* 134 U.S. 161 (1890).

(B) TRPA Governing Board Members are Entitled to the Same Immunities as Federal and State Legislators.

In *Tenney v. Brandhove* (supra), the immunity from liability previously afforded Federal legislators was extended to members of a fact-finding committee established by resolution of the California Legislature.

The responsibilities thrust upon the members of the TRPA Governing Board are clearly greater than those of a mere legislative fact-finding committee, and the rationale for the grant of absolute legislative immunity is even more compelling.

No single state legislature could enact legislation, or establish a legislative committee to resolve the problems endangering the environment of Lake Tahoe. It required legislation by both California and Nevada, as well as the consent of Congress to create a regional legislative body with power to enact the legislation needed to preserve the ecology of the Lake Tahoe region.

The national interest in preserving the region is shown in S. Rep. 91-510, 91st Cong., 1st Sess., 115 Cong. Rec., 33068-33069 (1969):

"Only two other sizeable lakes in the world are of comparable quality—Crater Lake, in Oregon, which is protected as part of the Crater Lake National Park, and Lake Baikal, in the Soviet Union. Only Lake Tahoe, however, is so readily accessible from large

metropolitan centers, and is so adaptable to urban development."

The need for such legislation was succinctly stated by the California Supreme Court in *People, ex rel. Younger v. County of El Dorado,* 5 Cal.3d 480, 486 P.2d 1193 (1971), at page 486:

> "A staggering increase in population, a greater mobility of people, an affluent society and an incessant urge to invest, to develop, to acquire and merely to spend—all have combined to pose a severe threat to the Tahoe Region. Only recently has the public become aware of the delicate balance of the ecology, and of the complex interrelated natural processes which keep the Lake's waters clear and fresh, preserve the mountains from unsightly erosion, and maintain all forms of wildlife at appropriate levels. Today, and for the foreseeable future, the ecology of Lake Tahoe stands in grave danger before a mounting wave of population and development."

Members of the Governing Body of TRPA, charged with protecting a region of national importance, and with legislative responsibilities transcending the boundaries of any one state, should be given the same freedom to act without fear of personal liability as is given to state legislatures and their committees.

(C) Public Policy Requires Absolute Immunity for the TRPA Governing Board Members.

Attempts to regulate development of the Lake Tahoe region so as to protect the ecology without unduly restricting private property rights are predestined to create controversy.

On the one hand, environmentalists complain that the regulation is not stringent enough (See *League to Save Lake Tahoe v. Tahoe Regional Planning Agency,* 507 F.2d 517 (9th Cir. 1974); action for declaratory and injunctive relief alleging that TRPA has not adopted adequate controls over development as required by the Compact).

On the other hand, land speculators such as petitioners herein claim that such controls are so stringent as to constitute a taking of private property for public purposes.

The individual governing board members have little to fear if they should abrogate their responsibility to adopt the regulations necessary to protect the ecology of Lake Tahoe.

If, however, the individual board members are subjected to liability for the adoption of such regulations, the repercussions with which the board members may be faced are serious indeed. The gravity of such extension of liability is clearly shown in this case, wherein petitioners, having been denied the specific commercial development which they proposed, are now requesting that the individual members of the governing board be held liable for 25 million dollars, the entire value of petitioners' property.

Respondents herein are placed very much in the position of the prosecuting authorities in the case of *Butz v. Economou,* ..... U.S. ....., 57 L.Ed.2d 895, wherein this Court held at page 921:

> "While there is not likely to be anyone willing and legally able to seek damages from the officials if they do not authorize the administrative proceedings (citation), there is a serious danger that the decision to

> authorize proceedings will provoke a retaliatory response. . . . when millions may turn on regulatory decisions there is a strong incentive to counter-attack."

As stated by this Court in *Tenney v. Brandhove* (supra) at page 377:

> "One must not expect uncommon courage, even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader or to the hazard of a judgment against them based on a jury's speculation as to motive."

If, with the benefit of hindsight, it appears that the TRPA Land Use Ordinance is unduly harsh in restricting development, declaratory and injunctive relief are available (*Jacobson v. Tahoe Regional Planning Agency,* 566 F.2d 1353 (1977)). The extension of *Bivens* to create personal liability on the part of the individual governing board members is not necessary to project the rights of petitioners and seems clearly unfair to the governing board members.

Thus, even if absolute legislative immunity were not available, the unique functions of the individual respondents in this case require such immunity. As stated by this Court in *Butz v. Economou* at page 917:

> "Our decisions recognize that there are some officials whose special functions require a full exemption from liability."

Governing board members being faced with the spectre of personal liability in millions of dollars to land speculators will be hard-pressed to take the bold measures mandated upon them to enact the measures necessary to protect the Lake Tahoe environment.

It is submitted that this public policy reason is more than sufficient to leave the petitioners to their remedies in injunctive and declaratory relief, or, if damages are appropriate, to an action against the responsible public agency.

For these reasons, the individual respondents should be granted absolute immunity for the enactment of land use regulations designed to protect the Lake Tahoe environment.

PETITIONERS HAVE NOT SHOWN A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT TO THEIR DEVELOPMENT.

In *Procunier v. Navarette,* ..... U.S. ....., 55 L.Ed.2d 24 (Feb. 22, 1978) this Court reiterated the longstanding rule that, even those governmental officials who are not entitled to absolute immunity are immune from suit for violation of constitutional rights, unless the right alleged to be violated is "clearly established" at the time of the violation.

The enactment of the Conservation Reserve Zone regulating development of petitioners' property did not violate any such "clearly established" right. Petitioners did not have a vested right to develop as they saw fit. As stated by this Court in *Penn Central Transp. Co. v. New York City,* ..... U.S. ....., 57 L.Ed.2d 631 at p. 652:

> ". . . . the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."

California law had clearly established that petitioners did not have a vested right to develop by reason of the El Dorado County approval of their proposal. See *AVCO Community Developers Inc. v. South Coast Regional Commission,* 17 Cal.3d 785, 533 P.2d 546 (1976) wherein it was held that the obtaining of a grading permit, approval of a final tract map, on-site grading, subdivision improvements, and expenditures in excess of two million dollars in preparatory work do not establish a vested right. The court in *AVCO* stated at page 793:

> "By zoning the property or issuing approvals for work preliminary to construction the government makes no representation to a land owner that he will be exempt from zoning laws in effect at the subsequent time he applies for a building permit or that he may construct particular structures on the property, and thus the government cannot be estopped to enforce the laws in effect when the permit is issued."

It is not likely that respondents could have perceived that requiring petitioners to comply with the environmental constraints of the Conservation Reserve District might constiute the taking of property without due process of law. Although the environmental constraints would undoubtedly affect the value of the property somewhat, diminution in value, in and of itself, had not been held to be a "taking". See *Hadacheck v. Sebastian,* 239 U.S. 394, 60 L.Ed.2d 348, 36 S.Ct. 143 (1915) (87½% diminution in value held not to be a "taking"). The California Supreme Court has upheld a zoning ordinance prohibiting the quarrying of gravel in the face of the trial court's finding that the subject property was of great value if used for gravel excavation but of "no appreciable economic value"

for any other purpose and that any suggestion that the property has economic value for any other purpose "is preposterous" (*Consolidated Rock Products Co. et al. v. City of Los Angeles,* 57 Cal.2d 515, 370 P.2d 342 (1962)).

Even this Court in its last term was divided five to four on the issue of how far land use regulation may go before it constitutes a taking (*Penn Central Transp. Co. v. New York City,* ..... U.S. ....., 57 L.Ed.2d 631 (June 26, 1978)).

To require the members of the TRPA governing board to have the percipience to predict the exact boundaries of their powers in regulating land to protect the environment in the face of a legislative mandate to adopt all necessary regulations to preserve the Lake Tahoe region, is simply asking too much.

A DAMAGES REMEDY IS NOT APPROPRIATE UNDER 28 U.S.C., SEC. 1331, IN ALL INSTANCES.

The Court of Appeals herein held that a cause of action in damages could be stated against the individual defendants under the general jurisdictional statute (28 U.S.C., Sec. 1331), relying upon *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L Ed.2d 619 (1971). In *Bivens,* this Court was faced with the issue of whether an innocent victim of an illegal search and seizure in violation of the Fourth Amendment should be entitled to a remedy in damages, as opposed to no remedy at all. This Court pointed out that the Constitutional violation could not be vindicated by quashing the evidence obtained, since there was no criminal prosecution. As stated by Justice Harlan in his concurring opinion (403 U.S. p. 409):

"Putting aside the desirability of leaving the problem of federal official liability to the vagaries of common law action, it is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position."

In *Butz v. Economou,* ..... U.S. ....., 57 L.Ed.2d 895 (1978), this Court declined to extend *Bivens* beyond Fourth Amendment claims (57 L.Ed.2d 895, p. 903, Footnote (8)):

"The Court's opinion in *Bivens* concerned only a Fourth Amendment claim and therefore did not discuss what other personal interests were similarly protected by provisions of the Constitution. We do not consider that issue here. Cf. *Doe v. McMillan,* 412 U.S. 306, 325, 36 L.Ed.2d 912, 93 Supreme Court 2018 (1973)."

BIVENS DID NOT PURPORT TO CREATE A CAUSE OF ACTION IN INVERSE CONDEMNATION AGAINST INDIVIDUAL LEGISLATORS. NO INDIVIDUAL SHOULD BE HELD PERSONALLY LIABLE FOR THE TAKING OF PRIVATE PROPERTY FOR PUBLIC PURPOSES.

Petitioners do not allege that the TRPA governing board members have taken private property for their own uses. Rather, they allege that the TRPA regulations have the effect of taking petitioners' property for public uses without just compensation.

The courts have not been hesitant to prevent the taking of private property for public purposes without just compensation. Where the taking is by physical invasion, the right to compensation is clear (*Jacobs v. U.S.,* 290 U.S. 13 (1933)). Where the taking is in the guise of regulation,

there appears to be no clear line between those cases wherein compensation is awarded, and those wherein the regulation is simply held invalid.[2]

In all cases, however, where damages have been awarded, it is the *public* which has been required to pay.

As stated by this Court in *Boom v. Patterson,* 98 U.S. 403 (1878) p. 406:

"The right to eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the Constitutions of the several states providing for just compensation for property taken is a mere limitation upon the exercise of the right."

Thus, if petitioners' property has been taken in violation of petitioners' Fifth Amendment rights, it has been taken by the sovereign, and it is the sovereign which is responsible for just compensation.

As stated by this Court in *Armstrong v. U. S.,* 364 U.S. 40 (1960):

"Fifth Amendment guarantee that private property shall not be taken for a public use without just com-

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[2]*Arastra Ltd. Partnership v. City of Palo Alto,* 401 F.Supp. 962 (No. Dist. Cal. 1975); City made firm decision to purchase plaintiff's property, appropriated funds for acquisition, and adopted a zoning ordinance preventing all development.

"The plain and admitted object of the open space ordinances was to achieve the same result to the full extent as possible, as would have been achieved through purchase of the land itself." (Damages in inverse condemnation awarded.)

Cf. Penn. Coal v. Mahan, 260 U.S. 393 (1922) Statute prohibiting coal mining adopted to protect owners of surface rights who had assumed the risk of subsidence held invalid. *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills,* 40 N.J. 539, 139 Atlantic 2d 232 (1963); Fill ordinance designed to preserve swamp in hope of future acquisition held invalid.

pensation was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

If TRPA has overstepped its bounds in regulating the uses of private property for the protection of the public, and if a damages remedy is appropriate, then any such damages should be paid by the public which benefited from the regulations and not the individual legislators whose actions were taken for the benefit of the public.

It is one thing to hold governmental officials, acting for their own selfish interests, personally responsible for damages they have caused by wilful violation of personal interests protected by the Constitution.

It is quite another to hold that, where property is taken for public purposes without just compensation, the public is entitled to retain the benefits of the "taking", but the compensation must be paid by the members of the governing body of the public agency allegedly responsible for the taking.

If the regulation in question has the effect of a compensable taking under the Fifth Amendment, then the regulation should either be set aside, or compensation paid from the public treasury.

CONCLUSION

If the TRPA Land Use Ordinance is overly restrictive, petitioners have an adequate remedy by way of injunctive and declaratory relief.

If the TRPA land use regulations have the effect of taking petitioners' property for public purposes without just compensation and, assuming, arguendo, that damages is an appropriate remedy, petitioners are free to proceed against the public agency responsible for the taking.

It is a novel and disturbing concept that individual legislators acting for the benefit of the public, under color of federal law, should be held personally liable to provide just compensation for private property taken for public purposes.

Neither precedent nor public policy justifies the imposition of such liability in this case.

Dated: October 17, 1978.

Respectfully submitted,
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